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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 196

HERBERT SCHNEIDER, APPELLANT

v.

WILLARD SMITH, COMMANDANT, UNITED STATES COAST GUARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. 9a) dismissing appellant's complaint for injunctive relief against the enforcement of the Magnuson Act (50 U.S.C. 191) on the ground of its unconstitutionality.

Appellant has a merchant mariner's document, issued to him in September 1956.[1] He was first issued

[1] The Coast Guard issues merchant mariner's documents to those who wish to seek employment on commercial vessels flying the United States flag. Apart from the screening program here

his seaman's papers in 1940, and between 1942 and 1949 he served in various capacities aboard commercial vessels flying the United States flag, including as wiper, oiler, and fireman, and as second, third, and fourth assistant engineer. He possesses the necessary papers or licenses which evidence his technical ability for all of those positions. In later years, appellant has been employed ashore.

On October 20, 1964, appellant applied to the Commandant of the Coast Guard for special validation endorsement of his merchant mariner's document. That endorsement (further described *infra,* pp. 4–6) is required by executive orders and regulations promulgated pursuant to the Magnuson Act, 50 U.S.C. 191, to permit the seaman to sail aboard merchant vessels of the United States of 100 or more gross tons. Together with his application, appellant returned a printed questionnaire (R. 77–82) filled in by him, which called for disclosure of past and present membership in certain designated organizations,[2] including the Communist Party. Since appellant answered affirmatively the question relating to membership in the listed organizations, he was required to provide further particulars on the questionnaire. His response was (R. 82)—

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in question, the documents serve to identify seamen, who are not required to carry passports. In addition, a merchant mariner's document shows the seaman's rating and qualification for certain positions aboard ship, such as engineer, mate, and the like, ratings determined by a seaman's experience and by results of tests administered by the Coast Guard as part of a broad program to insure the safety of merchant vessels and crew.

[2] "Designated" by the Attorney General under Executive Order 10450, 18 F.R. 2489.

I have been a member of many political & social organizations, including several named on this list.

I can not remember the names of most of them & could not be specific about any.

To the best of my knowledge, I have not been a member or participated in the activities of any of these organizations for ten years.

By letter dated March 25, 1965, the Commandant advised appellant that the answers to the questionnaire did not provide sufficient information for him to determine whether appellant's document should be specially validated (R. 70). The Commandant therefore requested appellant to respond under oath to certain interrogatories, set out below,[3] relating generally to the extent and meaningfulness of appellant's membership in any of the designated organizations (R. 70).

[3] The interrogatories (R 84–85) refer to appellant's earlier affirmative answer to the question whether he had been a member of organizations designated by the Attorney General, and to his statement quoted in the text above; he is then asked:

1. With respect to your statements above, furnish the following information, fully and honestly to the best of your ability:

(a) List the names of the political and social organizations to which you belonged, and location.

(b) Furnish approximate dates of membership.

(c) Furnish full particulars concerning the extent of your activities and participation in the organizations. (number and type of meetings/functions attended; positions or offices held; classes or schools attended; contributions made; etc.)

(d) Your reason for discontinuing the membership.

(e) Your present attitude toward the principles and objectives of the organizations.

If your answer is "YES" to the following Questions, *explain fully* in the space provided at the end of the Interrogatories:

Appellant's counsel replied that appellant declined to answer the interrogatories because "it can be none of the Government's business what he reads or what he thinks" (R. 72). He demanded that appellant's document be specially validated forthwith. The Commandment thereupon informed appellant and his counsel that, pursuant to regulation,[4] no further action on appellant's application could be taken unless and until the additional information was supplied.

Thereafter, appellant instituted this suit. In dismissing the complaint, the three-judge district court held that the Magnuson Act and the regulations adopted pursuant to it were constitutional, and that the Commandant's requiring the interrogatories to be

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2. Are you now, or have you ever been, a member of or affiliated with, in any way, the Communist Party, its Subdivisions, Subsidiaries, or Affiliates?

_____
(Answer "Yes" or "No")

3. Have you at any time been a subscriber to the "People's World"?

_____ If your answer is "Yes," give dates.
(Answer "Yes" or "No")

4. Have you at any time engaged in any activities in behalf of the "People's World"?

_____If your answer is "Yes", furnish details.
(Answer "Yes" or "No")

5. What is your present attitude toward the Communist Party?

6. What is your present attitude toward the principles and objectives of Communism?

7. What is your attitude toward the form of Government in the United States?

[4] 33 C.F.R. 121.05(d)(2) provides:

If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

answered as a condition to further administrative action violated neither appellant's First Amendment rights nor procedural due process (J.S. 1a–9a).

ARGUMENT

I. The Magnuson Act, 50 U.S.C. 191 (J.S. 3–4), provides *inter alia, That whenever the President* finds that the security of the United States is endangered by certain events, including "subversive activities," he "is authorized to institute such measures and issue such rules" as necessary; (a) to take full possession and control of vessels and to remove any person not specifically authorized by him to go or remain aboard if in his opinion it is necessary to prevent damage or injury to a vessel, any harbor, or waters of the United States, or to secure observance of rights or obligations of the United States, and (2) to safeguard against destruction, loss or injury from sabotage or other subversive acts, vessels, harbors, ports and waterfront facilities.

Pursuant to this Act, the President issued Executive Order 10173, 15 F.R. 7005, on October 18, 1950. Having found that the security of the United States was endangered by reason of subversive activities, he promulgated certain regulations, one of which authorized the Commandant of the Coast Guard to require every person employed on a merchant vessel of the United States to have a merchant mariner's document bearing a special validation endorsement for emergency service. The Commandant was empowered to prescribe the forms, contents and manner of issuance, to revoke or require surrender of such validated endorsement, and he has implemented his authority through further regulations (see 33 C.F.R. 6.10–1, 6.10–3, 6.10–9, and 121.01–121.05).

Under these regulations, the Commandant must decide whether he is satisfied that "the character and habits of life" of the applicant are such as to warrant the belief that his presence on board vessels of the United States "would not be inimical to the security of the United States" (33 C.F.R. 6.10–1, 121.25). The regulations set out procedures for the handling of applications for special validation endorsement, including the right to a hearing and appeal at three levels. Section 121.03 of the regulations sets out as "standards" certain categories of relevant information which "may preclude" a favorable determination to the applicant. These include acts of the applicant such as (a) advocacy of the overthrow or alteration of the government of the United States by unconstitutional means; (b) commission of or attempts to commit, espionage, sabotage, sedition or treason; (c) performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the government of the United States; (d) deliberate unauthorized disclosure of classified defense information; (e) membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended. These standards do not purport to be all-inclusive, and the Commandant may consider any such information along with other information relevant to the question whether the applicant's presence aboard a vessel would be inimical to the security of the United States.

Every court that has considered the question has held that the Magnuson Act authorizes the screening program outlined above (compare J.S. 19–20), although the early decisions found some procedural deficiencies in the former regulations. See, *e.g.*, *McBride* v. *Roland*, 369 F. 2d 65 (C.A. 2), certiorari denied *sub nom. McBride* v. *Smith*, No. 1105, Oct. Term, 1966, May 29, 1967; *Graham* v. *Richmond*, 272 F. 2d 517, 521 (C.A. D.C.); *Parker* v. *Lester*, 227 F. 2d 708, 715 (C.A. 9);[5] *United States* v. *Gray*, 207 F. 2d 237, 241 (C.A. 9); cf. *United States* v. *Aarons*, 310 F. 2d 341 (C.A. 2). Thus, congressional authorization for the program is not only, in the words of the Second Circuit in *McBride* (369 F. 2d at 69), "quite plain" from the broad language of the Act and its legislative history,[6] but also, it is an issue now well-settled, as the court below held (J.S. 4a–5a).

2. The regulations adopted pursuant to the Magnuson Act do not suffer from unconstitutional vagueness (compare J.S. 14–15). As we have pointed out, the regulations require that the Commandant satisfy himself from "the character and habits of life" of the individual, that the latter's presence on board a vessel would not be "inimical to the security of the

[5] Following the decision in *Parker* v. *Lester*, the regulations were amended to insure that the applicant receive a fair résumé of the information adverse to him and an adequate hearing in which to challenge that information.

[6] See 96 Cong. Rec. 10794–10795 (July 21, 1950) (remarks of Senator Magnuson); S. Rep. No. 2118, 81st Cong., 2d Sess. (1950). See also, Brown and Fassett, *Security Tests for Maritime Workers: Due Process Under the Port Security Program* 62 Yale L.J. 1163, 1188 (1953). Since the Act was passed as an emergency measure during the Korean crisis, its legislative history is limited.

United States." One factor the Commandant may consider is the applicant's "[m]embership in, or affiliation or sympathetic association with" any organization on the so-called "Attorney General's list." The Commandant has construed his regulation, as indeed its language clearly connotes, to require "knowing" rather than "mere" membership, in order to be considered as adversely affecting the individual's application for a document. In that light, the regulations are sufficiently definite to withstand appellant's attack. See *McBride* v. *Roland, supra,* 369 F. 2d at 69.

As the Court of Appeals for the District of Columbia Circuit said in reference to a similar screening program also administered by the Coast Guard (for radio-telegraph operators in the merchant marine), one which uses a similar standard—"character," "habits of life," and "suitable and safe person"—

> Other important public affairs are administered under statutory language no more precise, such as a finding of "public interest, convenience and necessity," or "restraint of trade," or "unfair methods of competition." While these examples do not relate to matters of individual liberty, they are, on the other hand, more indefinite than the criteria of the present statute.

Homer v. *Richmond,* 292 F. 2d 719, 723 (C.A. D.C.).

The regulations may not set forth a "neat, mathematical formulary," *Dennis* v. *United States,* 341 U.S. 494, 515, but they sufficiently and fairly inform both those administering the program and those who seek to challenge any adverse determination. See *American Communications Assn.* v. *Douds,* 339 U.S. 382, 412; *Killian* v. *United States,* 368 U.S. 231, 258.

3. Appellant's principal contention is that the Magnuson Act screening program, and more particularly, the requirement that he answer the interrogatories before his application will receive further consideration, violate his First Amendment rights (J.S. 12–14).

a. From the inception of the Nation, shipping has been a matter of great governmental concern, stemming from the importance of seapower as an agency of commerce and of national defense. Every aspect of shipping, including ship construction, preparation of ships for service, and procurement and qualifications of personnel, is closely regulated. See Gilmore and Black, *The Law of Admiralty,* 778–782 (1957). Quite naturally, the government—which regulates and subsidizes shipping, and provides training facilities for shipping personnel, see 46 U.S.C. 1126—will seek to assure the safety of shipping from subversive activity. Reasonable preventive measures must be taken to that end, among them the denial of clearance to seamen who have held long and meaningful membership in organizations such as the Communist Party.

The Commandant, acting pursuant to the Act, does not seek to regulate speech or association. He is only attempting to insure that merchant vessels and waterfront facilities are safeguarded from easy access by persons who are likely to damage them. And, as the court below noted (J.S. 5a):

> [I]t is hard to imagine a more strategic location for purposes of sabotage of vessels, harbors, ports, and waterfront facilities than in the bowels of deep-draft vessels.

Appellant's reliance (J.S. 13–14) upon cases such as *Elfbrandt* v. *Russell,* 384 U.S. 11, and *Aptheker* v.

Secretary of States, 378 U.S. 500, is misplaced. Those cases involved in effect penal statutes. *Aptheker* concerned Section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. 785, which provided that when a Communist organization is registered, or under final order to register, it shall be unlawful for any member, with knowledge or notice thereof, to apply for or use a passport.[7] The court held Section 6 unconstitutional on its face because it lacked the "knowing," "active," and "specific intent" elements. In so holding, the court pointed to "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application" (378 U.S. at 516).[8] In *Elfbrandt,* the court dealt with an Arizona statute which provided that a public employee required to take an oath to support the federal and State constitutions and the State laws was subject to prosecution for perjury and to discharge from office if he "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations" or "any other organization" having for "one of its purposes" the overthrow of the State government where the employee had knowledge of the unlawful purpose.[9]

Concededly, this Court's recent opinion in *Keyishian* v. *Board of Regents,* 385 U.S. 589, makes clear, as

[7] The maximum punishment for a violation of Section 6 was $10,000 and five years imprisonment. 50 U.S.C. 794(c).

[8] Quoting from *NAACP* v. *Button,* 371 U.S. 415, 433.

[9] The court noted (384 U.S. at 18, 19) that a penal statute touching rights protected by the First Amendment must be "narrowly drawn to define and punish specific conduct * * *" (quoting from *Cantwell* v. *Connecticut,* 310 U.S. 296, 311).

Elfbrandt and *Aptheker* also indicate, that the presence or absence of a criminal penalty in the statutory scheme, or its application, is not the sole touchstone for decision. But the vice of the statutory scheme held invalid in *Keyishian* was the "impermissible overbreadth" and "vagueness" of its "regulatory maze," through which the individual teacher was forced to transude (385 U.S. at 609, 599, 604).[10] No such objections can be made to the merchant marine screening program. Moreover, the statute involved in *Keyishian* made mere membership in the Communist Party prima facie evidence of disqualification. In contrast, under the Magnuson Act program, the Commandant, as this case illustrates, seeks to find out the extent and meaningfulness of a seaman's membership, and even that is only one factor he may consider in determining whether the seaman's presence on board a United States merchant vessel would be inimical to the security of the Nation.[11]

[10] We note also that *Elfbrandt* and *Keyishian* involved quite direct restrictions upon the dissemination of ideas—upon academic freedom, which this Court in *Keyishian* termed "a special concern of the First Amendment" (385 U.S. at 603). Doubtless, the denial of access to limited areas of employment affecting the national security might have, in some cases, a deterrent effect upon the free expression of ideas, but it cannot be considered that kind of wholesale infringement involved in *Elfbrandt*, *Keyishian*, and to a lesser extent, *Aptheker*, in all of which "less drastic" alternatives were available.

[11] Appellant's analogy to a bill of attainder is therefore inapt (see J.S. 18–19). Membership in an organization on the so-called "Attorney General's list" does not alone render a seaman ineligible for special validation of his document; no punishment for past acts is involved; and clearly the Commandant must decide *in each case* the question whether the *individual's* presence on board a United States merchant vessel would be inimical to the country's security. See *American Communications Assn.* v. *Douds*, 339 U.S. 382, 413–414.

Considering the purpose the Magnuson Act program is designed to serve, the Commandant's interrogatories in this case pursue a relevant and permissible line of inquiry—more clearly than the somewhat similar inquiries upheld in *Konigsberg* v. *State Bar*, 366 U.S. 36, and *In re Anastaplo*, 366 U.S. 82 (membership in the Bar).

b. If (as we believe) the Commandant may seek to determine the extent and meaningfulness of appellant's activity in the organizations to which he admitted being at least a past member, then it follows that the Commandant may hold appellant's application in abeyance until the answers are forthcoming. *Konigsberg, supra*, 366 U.S. at 44; *Borrow* v. *Federal Communications Comm'n*, 285 F. 2d 666 (C.A. D.C.), certiorari denied, 364 U.S. 892; *Blumenthal* v. *Federal Communications Comm'n*, 318 F. 2d 276 (C.A. D.C.), certiorari denied, 373 U.S. 951.

Thus, there is no merit to appellant's complaint (J.S. 15–17) that the prescribed procedure, which he has not yet followed, is inadequate. An application is first considered by the Commandant. Should he deny it, the application is, if requested, considered by a Hearing Board, and the applicant is given the opportunity to offer evidence in a hearing at which he may present witnesses and at which he is afforded the rights to confrontation and counsel. That Board makes an independent recommendation to the Commandant. Should the latter adhere to his decision, the applicant may appeal to an Appeal Board, which may conduct an additional hearing, following which it similarly makes a recommendation to the Com-

mandant. As the Second Circuit held in the *McBride* case, *supra*, 369 F. 2d at 68:

> Procedurally, there is no lack of due process in the statutory scheme, with opportunity to present evidence and cross examine adverse witnesses before the Boards, determination by the Commandant at each stage * * *.

As the court below pointed out, appellant has so far "refused to provide the raw materials" (J.S. 9a) for the Commandant to make the necessary determination. Should appellant do so, and in the event that the Commandant's initial decision is adverse to him, then the procedure outlined will be available to him.[12]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

THURGOOD MARSHALL,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

JUNE 1967.

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[12] Our position here is similar to that in *United States* v. *Robel*, No. 83, Oct. Term, 1966, set for reargument as No. 8, this Term (see the government's brief in No. 83, pp. 40–48). However, whatever the ultimate constitutional standard may be in *Robel*—*i.e.*, whether the element of "specific intent" must be established—it is clear we think, that appellant cannot fail to furnish relevant information in order for the Commandant to make an informed decision.

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